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No. 95-1373

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MICHAEL A. LEBRON,
Petitioner,
v.
THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment requires that Amtrak depart from its longstanding policy of limiting an enormous illuminated billboard in Pennsylvania Station to commercial advertising and permit the display of petitioner's political attack ad.

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petitioner in this case seeks to compel the National Railroad Passenger Corporation ("Amtrak") to make available the massive "Spectacular" billboard that dominates the entrance to Pennsylvania Station in New York for the display of an advertisement attacking the political activities of the Coors family, owners of the Coors Brewing Company. Amtrak re-

jected petitioner's political advertisement pursuant to the corporation's longstanding policy of limiting the Spectacular to commercial advertising. Petitioner has alleged that, regardless of any policy, the contract he signed required Amtrak to display his political advertisement. Petitioner also has alleged that Amtrak's policy of excluding political advertising from the Spectacular violates the First Amendment.

The district court deemed resolution of petitioner's contract claim "superfluous," because it instead found that the First Amendment compelled Amtrak to display petitioner's political attack ad. App. 22c n.13.[1] The court of appeals reversed. Applying this Court's "public forum" doctrine, the panel concluded that Amtrak's refusal to accept political advertising on the Spectacular was reasonable and viewpoint-neutral, and that petitioner therefore had no First Amendment right to display his advertisement on the Spectacular. App. 4a. The court of appeals ordered that petitioner's constitutional claim be dismissed, and remanded the case for consideration of his contract claim. App. 3b.

The petition should be denied for two reasons. First, the case is not ripe for review, because petitioner's contract claim remains to be decided by the courts below. Second, the decision below does not warrant review on the merits, because it was based on well-established principles of public forum law and a decision of this Court, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), that is indistinguishable on the facts.

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[1] Citations to App. —— are to the pages of the appendix to the Petition. Citations to C.A.App. —— and E —— are to pages of the joint appendix and exhibit volumes in the court of appeals.

A. Background

1. *The Spectacular*

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular." App. 4a. As anyone who has been in Penn Station can attest, it is virtually impossible not to notice the Spectacular as one enters the Amtrak terminal and descends on the escalators that directly face it. C.A.App. 1177. In the words of the district court, its presence is "inescapable." C.A.App. 139.

The Spectacular was constructed in 1967 by Transportation Displays, Incorporated ("TDI"), a privately-held advertising agency, pursuant to a contract with the Pennsylvania Railroad Company, which then owned Penn Station. The contract gave TDI the right to "construct and maintain, at [its] own cost and expense, an advertising Spectacular display for sale to advertisers." E 188. TDI agreed to pay the railroad a percentage of the gross receipts derived from advertising displayed on the Spectacular, and it agreed further that no advertisement would be displayed without prior approval of the railroad. E 190, 192.

Amtrak, which now owns Penn Station and exercises complete control over the area where the Spectacular is located, has continued essentially the same arrangement that the Pennsylvania Railroad Company had with TDI. The contract now in effect between Amtrak and TDI authorizes TDI to sell advertising space on the Spectacular and in other locations, and provides that TDI shall pay Amtrak a percentage of its net receipts. E 3. It also expressly provides

that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of presentation and design, shall be subject to approval by Amtrak." E 5.

Advertising on the Spectacular (which sells for nearly $20,000 per month) at all relevant times was overseen by Amtrak's Real Estate and Operations Development Department. E 2345. The Vice President for that Department, Anthony DeAngelo, applied Amtrak's advertising policies and made the final decision whether to approve ads for the Spectacular. C.A.App. 106-08.

Political advertising has *always* been prohibited on the Spectacular. C.A.App. 107, 365-66, 813-15, 823-24, 844. In fact, the Pennsylvania Railroad Company adopted this policy in 1967 when the Spectacular was first built—years before Amtrak even existed. C.A.App. 365-66, 813-15; E 192. Amtrak continued the policy when it assumed control over the Spectacular in 1976 because, like the Pennsylvania Railroad, it recognized that partisan displays might offend or anger some of its customers. In the nearly three decades since its construction, no remotely political or other noncommercial advertisement has ever appeared on the Spectacular.[2] As Chief Judge Newman noted in dissent below, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for pro-

[2] The only ads that have appeared on the Spectacular are those promoting the DuPont Company, Resorts International in Atlantic City, the Broadway play "Sophisticated Ladies," Fujitsu computers, Nike athletic wear, and A&S Department Store. App. 7a.

moting 'The Far Right's political agenda.' " 12 F.3d at 394.

2. *Amtrak's Rejection of Petitioner's "Advertorial"*

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors beer drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a flaming Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the advertorial contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "The Far Right's political agenda." App. 5a.[3] Although he now contends that the "subject matter" of his advertorial is "whether to buy Coors Beer," Pet. 15, petitioner previously described the display as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures," App. 4a-5a.

On November 30, 1992, petitioner signed a contract with TDI to display his work for two months on the Spectacular. App. 4a. Petitioner knew when he signed the TDI contract that Amtrak retained the right to reject his ad. App. 4a. And he anticipated that there might be objection to the display of his advertorial on the Spectacular because of its "unusual nature." As he conceded, "[i]t wasn't commercial in the way they are used to." C.A.App. 228. In fact, "because of the subject matter" of his work, petitioner deliberately avoided disclosing its content to TDI until December 2, 1992, two days after he signed the TDI contract. C.A.App. 201-03, 211.

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[3] The full text of petitioner's advertorial is reprinted in the Appendix to this Brief in Opposition.

On December 17, Amtrak's Vice President, Anthony DeAngelo, first learned of petitioner's proposed ad. He immediately rejected it as political. C.A.App. 107-08. In a letter dated December 23, 1992, DeAngelo notified TDI of his decision, invoking Amtrak's longstanding "policy that it will not allow political advertising on the spectacular advertising sign." App. 5a; C.A.App. 114.[4]

TDI offered petitioner any one of 500 alternative sites in New York City, all of which he rejected. App. 5a. As petitioner explained, he considers the Spectacular "an extraordinarily unique advertising location in New York City." App. 6a.

B. The Decisions Below

Petitioner commenced this action on December 30, 1992, seeking an injunction requiring Amtrak to display his advertorial. Petitioner advanced two claims: (1) that Amtrak's refusal to display his advertorial breached certain contractual obligations owed him under the lease he signed, entitling him to specific performance; and (2) that the First Amendment required Amtrak to provide him access to the Spectacular for display of his political ad. C.A.App. 84-95.

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[4] Petitioner contends that Amtrak's policy is "unwritten" and "undisseminated." Pet. 19. But when petitioner last briefed the case to this Court, he acknowledged that "[t]he advertising policy at issue here preceded DeAngelo's arrival at Amtrak . . . and is reflected in writing in Amtrak's leasing contracts." Brief for Petitioner (No. 93-1525), at 13. And although the policy may not have been widely disseminated to all Amtrak employees, what matters is that Anthony DeAngelo —the person responsible for overseeing third party advertising on the Spectacular and who rejected petitioner's ad—knew of and understood Amtrak's policy.

The district court conducted a trial entirely on documentary submissions—including deposition transcripts, exhibits, stipulations, and admissions derived from each party's "mark-up" of proposed findings of fact submitted by the opposition.

On February 5, 1993, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. The court held that Amtrak's decision to refuse to display petitioner's political advertorial on the Spectacular violated the First Amendment. App. 14c-22c. In reaching this conclusion, the district court ignored this Court's well-established public forum doctrine, which permits the government, when acting as proprietor rather than lawmaker, to control access to its property "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2147 (1993) (quotation omitted). The district court failed to define the forum at issue, failed to determine whether the Spectacular (or whatever else the court thought the forum to be) was a public or nonpublic forum, and failed even to mention—let alone distinguish—*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a decision of this Court expressly upholding a municipal government's policy of prohibiting political advertising on city buses. The district court justified its holding that Amtrak must grant petitioner access to the Spectacular by applying *strict scrutiny*, in reliance on cases involving *public fora* open to all expressive activity. App. 14c-21c. The court did not reach petitioner's "alternative contract theory," explaining that "this resolution makes it superfluous." App. 22c n.13.

On October 30, 1995, in an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that petitioner had no First Amendment right to display his advertorial on the Spectacular. App. 4a.[5] Unlike the district court, the court of appeals applied public forum doctrine. Relying on this Court's decision in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), the panel first determined that the relevant forum for purposes of analysis was the Spectacular, because petitioner sought access only to this unique property. App. 9a-10a. Next, the court of appeals looked to Amtrak's "policy and practice" to determine whether Amtrak "intended to designate" the Spectacular as a forum for political advertising. App. 10a (citing *Cornelius*, 473 U.S. at 802). The panel found that Amtrak's "practice is clear; it has never opened the Spectacular for anything except purely commercial advertising." App. 10a. The court concluded that "[i]n light of Amtrak's undisputed practice . . . the Spectacular is not a public forum." App. 11a.

Having determined that Amtrak had not intentionally designated the Spectacular an open forum for political speech, the panel turned to the question whether Amtrak's decision met the requisites established by this Court for regulating access to a non-

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[5] The court of appeals initially held, on December 27, 1993, that Amtrak was not a governmental actor for constitutional purposes. 12 F.3d 388 (2d Cir. 1993). Last year, this Court reversed that decision, holding that Amtrak is bound by the First Amendment. 115 S. Ct. 961 (1995). The Court remanded the case for a determination whether Amtrak's refusal to display petitioner's advertorial violated the First Amendment—a question upon which this Court "express[ed] no opinion." *Id.* at 975.

public forum. Relying on this Court's decision in *Lehman v. City of Shaker Heights*, *supra*, which upheld a policy virtually identical to Amtrak's exclusion of political advertising from the Spectacular, the panel found Amtrak's policy to be both reasonable and viewpoint-neutral. App. 11a-16a. Accordingly, the court of appeals reversed the judgment and remanded the case with the instruction that the district court dismiss petitioner's complaint, leaving petitioner "free to pursue his state law claim in state court." App. 18a.

On December 29, 1995, the court of appeals amended its earlier decision in two respects. First, the panel corrected a factual error in the opinion. The court had written that Amtrak's prohibition against political advertising "was limited in scope to the Spectacular." App. 16a. Although Amtrak applies the policy differently to the Spectacular (conducting prior review and approval of all proposed advertisements), Amtrak prohibits political advertising on all of its property. C.A.App. 349-52. The court of appeals amended its opinion to reflect this fact, but that amendment had no impact on the court of appeals' analysis—whether or not Amtrak has opened a forum for political advertising elsewhere is irrelevant to whether petitioner may display his advertorial on the Spectacular. App. 3b.

Second, the panel amended its disposition of petitioner's contract claim. Instead of leaving that claim for a state court to resolve, the panel instructed the district court on remand to rule on petitioner's contract claim. The court reasoned that "[b]ecause initial subject matter jurisdiction over Lebron's federal claim is now clear, and a full trial has been conducted on an expedited basis . . . the interests of judicial

economy and fairness to the parties counsel that this litigation be completed in federal court." App. 3b (quotation omitted). Rather than complete this litigation in the district court, Lebron instead petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW A NON-FINAL JUDGMENT IN AN ONGOING CASE

This Court's established practice is to "await final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Virginia Military Institute v. United States*, 113 S. Ct. 2431, 2432 (1993); *see, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari because the court of appeals' remand of the case rendered the decision "not yet ripe for review by this Court"); *American Construction Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). The lack of finality in the judgment below "of itself alone" furnishes "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

No final judgment exists here. Still pending before the district court is petitioner's contract claim, which may provide him precisely the relief he seeks from this Court. Petitioner claims that, regardless of whether Amtrak may adopt a policy prohibiting political advertising on the Spectacular, he possesses a contractual right to display his advertorial in that forum. C.A.App. 93-94 (Complaint), 1326-45 (Plaintiff Michael Lebron's Pre-Trial Proposed Con-

clusions of Law). Amtrak disagrees, but no court has yet passed on that claim.

The procedural posture of this case provides a particularly compelling reason why this Court should decline to exercise its certiorari jurisdiction. Resolution of petitioner's contract claim might obviate any need for this Court to address a constitutional question. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [this Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). *See generally Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of . . . general law, the Court will decide only the latter."); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984) (when a case may be decided "solely on the basis of a pendent state-law claim . . . the court usually should do so in order to avoid federal constitutional questions").

Accordingly, this Court should deny the petition and permit the district court to resolve petitioner's contract claim—a claim that the district court should have addressed in the first instance before reaching any constitutional questions.

II. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S PUBLIC FORUM DECISIONS

The merits of this case do not warrant review by this Court in any event. Petitioner contends that this case "presents the opportunity to provide much needed guidance in a notoriously confused area of

First Amendment doctrine," and that the decision of the court of appeals, "if left unreviewed, would mark the death knell of public forum doctrine." Pet. 13, 14. Neither assertion is correct. The court of appeals applied legal principles well established by more than a half dozen decisions of this Court—one of which, *Lehman v. City of Shaker Heights, supra*, is directly on point.

A. This Court's Public Forum Doctrine Is Clear and Well-Defined

It is "well settled" that even "the government need not permit all forms of speech on property that it owns and controls." *International Society For Krishna Consciousness, Inc.* (*"ISKCON"*) *v. Lee*, 505 U.S. 672, 678 (1992). "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes," this Court has held that "'[c]ontrol over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2147 (1993) (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985)).

"Not every instrumentality used for communication . . . is a . . . public forum by designation." *Cornelius*, 473 U.S. at 803. And the mere fact "[t]hat [expressive] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Id.* at 805. "The government does not create a public forum by inaction or by permitting

limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* at 802; *see ISKCON*, 505 U.S. at 680; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

The government may open a forum generally for expressive activity, or it may open a forum only "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." *Perry*, 460 U.S. at 46 n.7 (citations omitted). When the government creates a limited public forum, the "right of access . . . extend[s] only to other entities of similar character." *Id.* at 48. Those seeking to engage in speech not previously permitted in the forum may be excluded, so long as such distinctions are "reasonable" and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *ISKCON*, 505 U.S. at 679; *see Lamb's Chapel*, 113 S. Ct. at 2147; *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

B. The Court of Appeals Correctly Defined the Forum as the Spectacular

Application of this well-established framework makes this case an easy one. Because Amtrak has not heretofore opened the Spectacular for political advertising, it need not open the Spectacular to petitioner for that purpose.

It is undisputed that Amtrak has never designated the Spectacular as a forum for political speech, and that political speech has never appeared on the Spectacular. Faced with these apparently dispositive facts, petitioner argues that the relevant forum is something other than the Spectacular. Pet. 16-17. He

claims that the relevant forum is all of Penn Station, and that Amtrak has opened other parts of Penn Station to political advertising.

Petitioner is wrong that Amtrak has intentionally designated any portion of Penn Station as a forum for political advertising.[6] But that narrow factual dispute is irelevant in any event. The panel's holding that the Spectacular—and not Penn Station—is the relevant forum for purposes of analysis was clearly correct, and there has never been an ad on the Spectacular that is remotely political or anything other than purely commercial.

In a long line of unvarying authority, this Court has made plain that the forum is defined by "the

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[6] He repeatedly alleges that Amtrak "consistently" has displayed "political advertising" at Penn Station. *E.g.*, Pet. 3, 7. But no court has made such a finding, and there is no evidence anywhere in the record that a political advertisement of any kind, much less a political attack ad like the petitioner's, has ever been displayed anywhere in Penn Station. The district court pointed to a handful of ads that it asserted "are not 'commercial,' and some of which are arguably 'political.'" App. 20c. But the record discloses nothing whatsoever about the content of three of the cited ads—ads placed by the New York Departments of Commerce and the Environment and the Foundation for Muscular Dystrophy. The fourth ad—a paid ad for Plain Truth magazine—promotes a product, the magazine. The placement of that ad in Penn Station is consistent with the acceptance of advertisements for publications without regard to the publication's content. E 261, E 347. Both the panel majority, as well as the dissent, found that these "assertedly borderline cases" were of a different kind than petitioner's advertorial. App. 18a. As Chief Judge Newman explained in dissent, "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's . . . ." 12 F.3d at 394.

access sought by the speaker." *Cornelius*, 473 U.S. at 801. "When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [this Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Id.* (citation omitted).

For example, in *Lehman v. City of Shaker Heights*, where plaintiffs sought to compel the city to permit political advertising on city-owned buses, "[t]he Court treated the advertising spaces on the buses as the forum." *Cornelius*, 473 U.S. at 801; *see Lehman*, 418 U.S. at 303. Similarly, in *Perry Education Association v. Perry Local Educators' Association*, where the plaintiffs sought access to a school's internal mail system and teachers' mailboxes, the Court defined the forum as those internal mail facilities and not the school generally. 460 U.S. at 46. In *Cornelius v. NAACP Legal Defense & Education Fund*, where legal defense and political advisory organizations sought to be included in the Combined Federal Campaign ("CFC"), an annual charitable fundraising drive conducted in the federal workplace, the Court defined the forum as the CFC, not the federal workplace. 473 U.S. at 800-01. And in *United States v. Kokinda*, 497 U.S. 720 (1990), where the plaintiffs sought to "solicit alms and contributions" on a postal sidewalk, the plurality focused on whether the sidewalk, and not the entire post office, was a public or nonpublic forum. *Id.* at 727-37.

These cases—none of which is even mentioned by the petitioner—make clear that the forum here is the Spectacular. Petitioner does not seek general access to Amtrak property, to Penn Station, or even to the

advertising spaces located within Penn Station. Petitioner seeks access *only* to the Spectacular because, in his words, that forum provides "an extraordinarily unique advertising location." App. 6a. Petitioner maintains, and Amtrak agrees, that due to its size, location, and prominence, there is no other advertising vehicle in Penn Station that commands the same attention or offers a comparable vehicle to reach Amtrak passengers. App. 5a-6a. Because the Spectacular is a unique forum, and because petitioner seeks access to it alone, the court of appeals properly framed the issue in this case to be whether Amtrak has intentionally designated *the Spectacular* as a forum for political advertising.

Petitioner contends that the forum should be determined by the reach of Amtrak's policy, rather than by the access he seeks. That argument ignores not only established public forum doctrine, but also the facts of this case. Although Amtrak prohibits political advertising anywhere on its property, the application of that policy to the Spectacular differs in one critical respect: due to the Spectacular's size, location and prominence—and because there is no equivalent forum in Penn Station—Amtrak subjects only those advertisements slated to appear on the Spectacular to prior review and approval. C.A.App. 366. Amtrak's policy of prior approval on the Spectacular ensures that political ads will not appear in that forum through inadvertence, and establishes beyond doubt its intent to "exercise control over the subject matter of the displays." *Cornelius*, 473 U.S. at 804 (discussing *Lehman*).[7]

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[7] The law could hardly be as petitioner maintains. If the forum were Penn Station, not the Spectacular, Amtrak could

Petitioner contends that the court of appeals' analysis "conflicts with the decisions of the Seventh and Tenth Circuits." Pet. 17 (citing *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995) and *Eagon v. City of Elk City*, 72 F.3d 1480 (10th Cir. 1996)). This is a remarkable assertion. Before the Second Circuit, petitioner affirmatively recognized that the Seventh Circuit's decision in *Air Line Pilots* "supports Amtrak's argument that the Spectacular is the relevant forum [because] the court found that the forum is defined in terms of the access sought by the speaker." Supplemental Letter Brief (5/5/95) (quotation omitted). That concession was correct. Applying *Cornelius*, the Seventh Circuit held that the district court erred in defining the relevant forum as O'Hare Airport, rather than the advertising display cases to which the plaintiff sought access. 45 F.3d at 1151-52.

As for the Tenth Circuit's decision in *Eagon*, petitioner misstates the court's holding. The Tenth Circuit did not hold that "the relevant forum for First Amendment analysis was . . . the public park." Pet. 17-18. Rather, the court of appeals held that the park "during the 'Christmas in the Park' event was a public forum." 72 F.3d at 1487. Neither the Tenth Circuit's holding, nor what petitioner claims the hold-

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satisfy petitioner's demand for access by offering him advertising space elsewhere at Penn Station. Indeed, if petitioner were correct that the forum must be regarded as coextensive with Amtrak's policy against political advertising, then the forum must be regarded as *all* Amtrak property, because the policy applies on all Amtrak property. C.A.App. 349-52. In that case, Amtrak could satisfy the petitioner's demand for access by offering him space on any billboard it owns along its right-of-way. Plainly that is not what petitioner seeks.

ing to be, conflicts with the analysis of the court of appeals in this case.

In sum, the court of appeals faithfully applied well-settled legal principles and correctly determined that the Spectacular is the relevant forum.

C. This Court Has Held That a Policy of Prohibiting Political Advertising on Government Property Is Both Reasonable and Viewpoint-Neutral

The undisputed fact that no political advertising has ever appeared on the Spectacular forecloses any argument that the Spectacular has been designated a forum for political speech. The only remaining question, then, is whether Amtrak's choice is reasonable and viewpoint-neutral. This Court's decision in *Lehman v. City of Shaker Heights*, *supra*, makes plain that it is.

In *Lehman*, the City of Shaker Heights prohibited all political advertisements on city-owned buses, while permitting commercial and service-oriented advertising. This Court upheld the city's policy, emphasizing the commercial nature of the city's enterprise:

> [T]he city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

418 U.S. at 303 (plurality opinion). The plurality reasoned that in such circumstances, a governmental

limitation on access to property it controls is valid so long as the policy is not "arbitrary, capricious, or invidious." *Id.* Under that standard, the city's prohibition against political advertisements was permissible. Absent the policy, the plurality reasoned,

> [u]sers [of the buses] would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Id. at 304. Precisely the same reasoning is applicable here. As the court of appeals explained, citing *Lehman*, "Amtrak's decision, as proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable." App. 14a.[8]

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[8] Petitioner contends that "*Lehman* rests on a captive audience rationale not applicable here." Pet. 23 n.21. This Court has declined to so limit its decision in *Lehman*. *See ISKCON*, 505 U.S. at 678; *Kokinda*, 497 U.S. at 725-26; *Cornelius*, 473 U.S. at 801, 803-04, 806, 808-09; *Perry*, 460 U.S. at 49 n.9. In any event, the Amtrak riders who are forced to confront the 103 foot-long Spectacular as they descend the escalator at the entrance to Penn Station are no less "captive" than the audience that viewed the ads inside and outside the transit cars in *Lehman*.

Petitioner does not argue that Amtrak's decision to limit the Spectacular to commercial advertising is unreasonable, but rather that such a policy amounts to viewpoint discrimination. He contends that this case is not controlled by *Lehman*, but by *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), and *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995). Petitioner mischaracterizes the holdings in those cases, however, and misapplies them to the facts here.

In *Lamb's Chapel*, the Court held that a public school district engaged in impermissible viewpoint discrimination by opening a forum "to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." 113 S. Ct. at 2147. The school district had designated its property to be used for a wide variety of social, civic, and recreational purposes, but then denied access to a religious group that wished to use the forum for a lecture and film about family values. There was no dispute that "[t]he film involved . . . dealt with a subject otherwise permissible" under the district's policy, and that access was denied "solely because the film dealt with the subject from a religious standpoint." *Id.* at 2147. The Court concluded that the district had engaged in impermissible viewpoint discrimination by " 'deny[ing] access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.' " *Id.* (quoting *Cornelius*, 473 U.S. at 806).

Similarly, in *Rosenberger*, the Court held that the University of Virginia engaged in impermissible viewpoint discrimination by denying funding to a

student newspaper solely because of the paper's religious editorial views. The newspaper reported on a wide variety of subjects addressed by other student organizations, such as racism, crisis pregnancy, stress and eating disorders, but did so from a religious perspective. 115 S. Ct. at 2515. The Court held that the University's regulation, like the school district's policy in *Lamb's Chapel*, impermissibly distinguished between speakers based upon their views, rather than the subject matter of their speech:

> [T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

115 S. Ct. at 2517-18.

This Court's holdings in *Lamb's Chapel* and *Rosenberger* offer no support to petitioner. The Coors family's support of a particular political agenda, the Nicaraguan Civil War, and the "influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures," are not "subjects otherwise permissible" for display on the Spectacular. Had Amtrak permitted the expression of different views on these broad themes, then the exclusion of petitioner might amount to viewpoint discrimination. But Amtrak has

never opened the Spectacular for speakers to address such subjects—regardless of whether they espouse liberal or conservative, religious or secular, or any other views. Petitioner therefore cannot claim that Amtrak's enforcement of its policy as to him constitutes impermissible viewpoint discrimination.[9]

In sum, the court of appeals adhered to this Court's public forum case law in defining the applicable forum, in determining that Amtrak had not intentionally designated that forum for political speech, and in adjudicating Amtrak's policy to be reasonable and viewpoint-neutral. The court applied well-established legal principles and reached the correct result.

III. THE COURT OF APPEALS' DECISION ACCORDS WITH THIS COURT'S VAGUENESS AND STANDING CASES

A. Vagueness

Petitioner contends that, notwithstanding this Court's decision in *Lehman*, Amtrak's policy of prohibiting political advertising on the Spectacular is "unconstitutionally vague." Pet. 22. But surely petitioner has no serious doubt that his ad falls outside

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[9] Petitioner states that the Seventh Circuit in *Air Line Pilots* held that a policy against political advertising in O'Hare Airport would constitute viewpoint discrimination if " 'the proposed [advertisement] dealt with a subject that was otherwise permissible in a given forum.' " Pet. 15 (quoting *Air Line Pilots*, 45 F.3d at 1159). The Seventh Circuit did not find that a policy of excluding political advertising constitutes viewpoint discrimination, only that it would if inconsistently applied. That simply is not the case here. Amtrak has excluded *all* political advertising from the Spectacular, and has not denied petitioner access to that forum to discuss subjects "otherwise permissible" there.

the bounds of what Amtrak's policy permits. Amtrak has only allowed commercial advertising on the Spectacular, and petitioner has recognized that his advertorial "wasn't commercial in the way they are used to." C.A.App. 228. Amtrak does not permit "political" advertising on the Spectacular, and petitioner, a self-proclaimed "political artist," himself describes his advertorial as a "political statement." C.A.App. 8. Thus, the very term that petitioner deems "vague" is one that he himself uses to distinguish his work from other types of advertising.

Petitioner argues that this Court held in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), that the term "political . . . cause" is unconstitutionally vague. Pet. 22-23.[10] But the Court held no such thing. The ordinance at issue in *Hynes* required persons soliciting "for a Federal, State, County or Municipal political campaign or cause" to notify the local police department, in writing, of their proposed activities. *Id.* at 613. Those who failed to follow this procedure were subject to a criminal sanction. *Id.* at 615. This Court found that while "it is fairly clear what the phrase 'political campaign' comprehends . . . it is not clear what is meant by a 'Federal, State, County or Municipal . . . Cause'" *Id.* at 621 (second set of ellipses in original). The Court found only this latter phrase vague—not the term "political."

The decision of this Court that is on point is *Lehman*, which upheld a ban on political advertising without any reservation that the term "political"

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[10] This is the first time that petitioner has invoked *Hynes* to support a vagueness challenge. He did not cite this allegedly controlling case before the district court or the court of appeals.

might be unconstitutionally vague. Petitioner argues that "*Lehman* did not even address a vagueness claim." Pet. 23. But Justice Brennan argued strongly in dissent that "[t]he line between ideological and nonideological speech is impossible to draw with accuracy"—that it is not "possible to draw a manageable line" of the kind drawn by a policy prohibiting political advertising. 418 U.S. at 319, 320. Those arguments were unpersuasive to the majority.

B. Standing

Petitioner's standing argument is equally meritless. In effect, that claim amounts to nothing more than an effort by petitioner to recast his argument that Amtrak must grant him access to the Spectacular because, in his view, Penn Station has been designated an open forum for political speech. Having determined that the relevant forum is the Spectacular, the court of appeals explained that petitioner lacked standing to challenge the application of Amtrak's policy to some other forum to which he did not seek access. App. 3b. The court of appeals' reasoning is hardly "novel" or "unfounded." Pet. 24. Whether Amtrak could have invoked its policy to exclude petitioner from some forum other than the Spectacular is not an issue that petitioner has asked any court to resolve. To the contrary, petitioner has made clear that he has no interest in any advertising space other than the Spectacular.

Petitioner notes that standing has not been an issue in any of this Court's public forum cases, Pet. 25, but that is because the plaintiffs in those cases limited their challenge to their exclusion from the forum to which they sought access. Nothing in those cases, or any other case decided by this Court, con-

flicts with the court of appeals' decision not to adjudicate petitioner's right of access to a forum in which he has disavowed any interest.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

After a hard week's work, you're ready for the right place with the right one. Why make the right moment the right's moment? Coors Light not only has the taste that won't slow you down. It's the Silver Bullet that aims the Far Right's political agenda at the heart of America. Want the awesome facts? Then read between these lines.

Every year, the Coors family, owners of Coors Brewing Co., gives financial support to groups like The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. They form part of a network that includes authoritarian religious and political extremists. When you buy Coors products, you help them turn back civil rights, censure [sic] high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs. Did you know Joe Coors himself bought an aircraft for the Nicaraguan contras?

Where are the Nicaraguan contras today? El Loco says "Once, we were glad to have Joe Coors and his friends on our side. Together, we fought the hard and dirty fight that drove Nicaraguans to the voting booth to make The Right's Choice for a Better Nicaragua! Now the shooting war is over; after 30,000 dead, I can walk into my favorite Managua bar and say, 'No more of that industrial strength Nicaraguan cervesa for me. Gimme the great taste of Coors Light!' But my family, and Nicaraguan families everywhere, are poorer than ever. With 55% unemployed, we scour garbage heaps for food in the villages we ravaged. What happened to all that promised U.S. aid? What does it really mean to say that Coors Light is The Right's Beer now?"

E 2210-18 (footnotes omitted).